2013 IL App (4th) 120563-U

NO. 4-12-0563

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
April 24, 2013
Carla Bender
4th District Appellate
Court, IL

BOLAND MANAGED SERVICES, INC., Plaintiff-Appellant and Cross-Appellee, v. CORAL CHEMICAL COMPANY, Defendant-Appellee and Cross-Appellant.	)	Appeal from Circuit Court of McLean County No. 10L53
	)	Honorable Paul G. Lawrence, Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.
Presiding Justice Steigmann and Justice Pope concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court affirmed in part and reversed in part, concluding (1) the trial court did not err by (a) defining the ambiguous term "misconduct" with parol evidence, (b) finding BMS did not commit misconduct under the Marketing Agreement, (c) calculating commission owed to BMS under the Marketing Agreement, or (d) denying BMS's motion for sanctions pursuant to Illinois Supreme Court Rule 137 (eff. Feb. 1, 1994), but (2) the court erred in denying prejudgment interest.

¶ 2 On November 19, 2004, plaintiff, Boland Managed Services, Inc. (BMS), through its sole incorporator, Tom Boland (Boland), entered into a marketing agreement (Agreement) with defendant, Coral Chemical Company (Coral). Under the terms of the Agreement, BMS, as an independent sales consultant, would market Coral products to other companies, earning 40% of the consultant gross profit as commission.

¶ 3 On October 1, 2009, Coral terminated the Agreement with BMS, alleging BMS

committed misconduct. Under the Agreement, BMS would collect residual commission for one year after a termination for convenience. However, if BMS committed misconduct, BMS would collect no residual commission. BMS could also forfeit commission if it entered into a contract with a Coral competitor.

¶ 4 On March 17, 2010, BMS filed a complaint against Coral in the circuit court of McLean County, alleging Coral failed to pay BMS residual commission pursuant to the termination clause of the Agreement. On May 4, 2012, following a November 2011 bench trial, the trial court entered a written opinion and order. The court found BMS did not commit any misconduct under the Agreement. The court construed the Agreement to compel Coral to pay BMS 30% of the commission BMS previously received while under contract with Coral, but only as to certain accounts. Further, the court denied BMS's request for prejudgment interest and also refused Coral's request to find Boland the alter ego of BMS.

¶ 5 On May 31, 2012, BMS filed a motion to modify the trial court's judgment. Additionally, on June 14, 2012, BMS filed a motion for sanctions under Illinois Supreme Court Rule 137 (eff. Feb. 1, 1994). Coral, in turn, filed a motion for sanctions pursuant to Rule 137 on June 11, 2012. On June 14, 2012, the court denied all motions.

¶ 6 BMS appeals, asserting the trial court erred by (1) miscalculating commission owed to BMS under the Agreement, (2) denying BMS's Rule 137 motion for sanctions, and (3) failing to order prejudgment interest on commission owed to BMS. Coral cross-appeals, alleging the court erred by (1) finding BMS committed no misconduct under the Agreement and (2) awarding BMS commission pursuant to the contract despite BMS's termination for misconduct.

¶ 7 We affirm in part, reverse in part, and remand for further proceedings.

¶ 8 I. BACKGROUND

¶ 9 On November 19, 2004, BMS entered into the Agreement with Coral. Under the terms of the Agreement, BMS, as an independent sales consultant, would market Coral products to other companies, earning 40% of the consultant gross profit as commission. On October 1, 2009, Coral terminated the Agreement with BMS, alleging BMS committed misconduct. On March 17, 2010, Boland filed a complaint against Coral in the McLean County circuit court. The complaint alleged BMS was due commission as outlined within the Agreement.

¶ 10 A. The Agreement and Other Documents

¶ 11 1. *The Agreement*

¶ 12 Section 1 of the Agreement sets forth each party's duties as follows: "[BMS] will market and sell Coral products. *** [N]othing in this Agreement shall be construed as prohibiting or restricting the right of Boland to market other products or services, whether its own or those of third parties, except such products as may directly compete with" Coral products.

¶ 13 Section 3A of the Agreement, labeled "Compensation," provides "[BMS] will receive 40% of the gross profit for all Coral product sales it generates."

¶ 14 Section 5 of the Agreement governs termination of the Agreement. It states:

> "A. Both BMS and Coral shall have the right to terminate this Agreement at any time and for any reason upon thirty (30) days' written notice to the other party (hereinafter 'Termination for Convenience').
>
> B. Coral shall have the right to terminate this Agreement immediately without notice in the event [BMS] or [Boland] is

convicted of a fraud or a crime of moral turpitude, becomes bankrupt, has insolvency proceedings instituted against it or him, or engages in an act of dishonesty or other misconduct (hereinafter 'Termination for Misconduct')."

¶ 15 Finally, Section 6 of the Agreement details commission payments following termination. It provides, in relevant part,

"B. In the event of a Termination for Convenience, Coral shall pay [BMS] for one (1) year thereafter thirty percent (30%) of the consultant gross profit that would have otherwise been earned by [BMS] for continuing purchases by customers he was solely responsible for developing.

C. In the event of a Termination for Misconduct, no payments shall be due [BMS] other than payment for any Commissions previously earned prior to the effective date of termination.

D. No payments of commissions will be paid if [BMS] is employed or working in behalf with a competitor of Coral Chemical after termination."

¶ 16 2. *Termination Letter Sent to Boland*

¶ 17 On October 1, 2009, Donald LaFlamme, Coral's Midwest regional sales manager, sent a termination letter to Boland, alleging BMS committed misconduct with regard to two clients: E.K. Machine Co. Inc. (EK Machine) and Lozier Oil Company (Lozier Oil). BMS's

termination was effective immediately.

¶ 18 The letter indicated no residual commission was due to BMS because BMS's actions triggered the "Termination for Misconduct" provision of the Agreement. However, the letter also stated, "Coral is offering to pay to your company a commission at 30 percent of the consultant gross profit for one year, based on your company and you honoring a non-compete commitment. *** This offer is not required under the conditions of your Marketing Agreement. You have until 5:00 p.m. CST Thursday, October 15, 2009[,] to accept the above-mentioned offer."

¶ 19 3. *BMS's Response to Coral's October 1, 2009, Offer*

¶ 20 On October 28, 2009, BMS's attorney sent a letter to Peter Dority, Coral's vice president of sales and marketing, affirming BMS would "become inactive and [would] no longer engage in business or sales of any nature."

¶ 21 4. *Internal E-mail Sent to Coral's Comptroller from Coral's Vice President of Sales and Marketing*

¶ 22 On October 28, 2009, Dority sent an e-mail to Ellen Gross, Coral's comptroller. The e-mail states, "[Boland] will be paid 30% of the [consultant gross profit] or 75% of his previous earnings on these developed accounts for a period of one year. *** That is unless he is working in competition to Coral. We have a letter that says he will not be working in competition with Coral and will pay him unless we learn otherwise."

¶ 23 B. The Trial

¶ 24 1. *Tom Boland's Testimony*

¶ 25 A bench trial commenced on November 28, 2011. Boland testified he

was initially hired by Coral under a sales trainee program until he could develop a territory and shift into an independent sales contractor position. Boland's duties included marketing himself and promoting Coral products. This often required him to coordinate demonstrations for potential clients.

¶ 26 As required by Coral, Boland incorporated BMS so he could become an independent sales consultant for Coral. Boland was the sole incorporator, shareholder, and employee. Pursuant to the Agreement with Coral, BMS could market for other companies, so long as the products did not compete with Coral's products. Further, Boland testified he would receive a commission of 40% of the agreed-upon consultant gross profit.

¶ 27 Boland verified a list of accounts he was solely responsible for developing, but he noted two accounts, Toyota and Caterpillar-Aurora, were missing from the list. Although Toyota had a preexisting account with Coral, Boland asserted his efforts convinced the company to remain a client of Coral.

¶ 28 Moreover, Boland believed he was entitled to commission for the Caterpillar-Aurora account. Boland explained that after a Caterpillar representative viewed Coral products used during a process developed by EK Machine, Caterpillar-Aurora adopted the process and began purchasing from Coral.

¶ 29 Boland testified he cultivated a relationship with Caterpillar, Inc. over the course of five years. He described a process in which he would develop contacts with one Caterpillar facility and slowly gain contacts at other facilities. Boland explained Caterpillar required rigorous testing before it would consider any of Coral's products, which Boland facilitated on Coral's behalf. The eventual goal was for Caterpillar to purchase Coral chemicals to clean oil

and residue from Caterpillar machinery so the machinery could be painted. Prior to BMS's involvement, Coral had only two very minor accounts with Caterpillar.

¶ 30 To secure more sales of Coral products to Caterpillar, Boland suggested offering one of Caterpillar's existing suppliers, Lozier Oil, a commission to market Coral products to Caterpillar. Essentially, Lozier Oil would receive a portion of BMS's commission for each Coral product sold by Lozier Oil. Boland explained this practice was "extremely common" for Coral and other companies, citing examples. He testified he discussed his idea with Caterpillar to be sure it met with Caterpillar's high ethical standards. This plan could have resulted in additional Coral sales of up to $500,000 per year. The commission to Lozier Oil would decrease BMS's commission by 10% under BMS's proposal. Boland then detailed his proposal in an e-mail to LaFlamme, who rejected the proposal. Boland further stated he did not believe his actions were contrary to Coral's policies, describing it as "preposterous" and "ridiculous" to think he intended to bribe a customer so important to him, especially after it took so long to cultivate the relationship.

¶ 31 Boland testified he attempted to cultivate BMS's and Coral's relationship with Caterpillar by introducing Caterpillar to a process developed by EK Machine. EK Machine manufactured paint parts for heavy machinery, using Coral chemicals as part of its process. At the time, Matt Roeser, a salesperson for Coral, managed Coral's account with EK Machine. Boland differentiated his position from Roeser's by explaining Roeser was a Coral employee who could market only Coral products, whereas Boland was an independent sales consultant able to market for other companies.

¶ 32 Boland testified he approached Caterpillar about EK Machine's process and

offered to schedule a viewing. Boland approached Roeser with the idea on Monday, August 31, 2009. Roeser arranged a viewing between Caterpillar and EK Machine for Thursday, September 3, 2009. Boland obtained permission from Roeser to visit the EK Machine facility on Wednesday, September 2, 2009, to ensure the production line was in order. Boland stated he was impressed by the quality of the production line. When an EK Machine employee introduced Boland to an EK Machine sales manager, Boland said he thought BMS could help EK Machine gain Caterpillar's business. Because BMS's contract permitted BMS to market non-Coral products, Boland did not believe his offer to market EK Machine's products was improper. Moreover, Boland did not believe his offer to market EK Machine's products to Caterpillar interfered with Roeser's Coral account with EK Machine.

¶ 33 The demonstration was scheduled to begin at 9:30 a.m. on Thursday. EK Machine's production line was located in southern Wisconsin, approximately 150 miles from BMS headquarters. Boland, who rendezvoused with one Caterpillar representative along the way, arrived at approximately 10:30 a.m. While en route to the facility, Boland received a call from Roeser and explained he was running late. Part of Boland's tardiness was due to waiting for the Caterpillar representative to meet with him. Approximately 45 minutes after Boland's arrival at EK Machine's facility, Caterpillar's global procurement manager for paint arrived.

¶ 34 The Caterpillar representatives proceeded through the safety precautions and viewed the facility. Boland described the Caterpillar representatives as engaged and interested. He thought the viewing would lead to increased sales of Coral chemicals, which it did when the Caterpillar-Aurora facility adopted the process. Boland acknowledged receiving requests from Roeser and EK Machine to provide the names of the Caterpillar representatives before the

demonstration for security purposes, but he admitted he failed to provide the names. However, Boland noted their identities were confirmed upon their arrival at the facility. He denied withholding the names in order to secure a commission for himself, but he explained he did not have Caterpillar approval to provide the representatives' names.

¶ 35 After viewing the production line, Boland and the Caterpillar representatives left the facility. Boland testified EK Machine representatives did not appear to be upset about the Caterpillar representatives leaving after the viewing. Roeser, Caterpillar, and EK Machine did not convey anything negative to Boland about the visit. Boland stated he was unaware his late arrival would impact the daily production line at EK Machine.

¶ 36 On October 1, 2009, Boland received a letter from Coral terminating the contract with BMS due to BMS's alleged misconduct regarding (1) the visit to EK Machine and (2) the suggestion to pay commission to Lozier Oil. Boland denied any wrongdoing. Within the termination letter, Coral offered to pay BMS a 30% consultant gross profit for one year on accounts solely developed by BMS, if BMS did not market products of Coral competitors. Boland stated BMS ceased to operate after receiving the termination letter. At the end of October 2009, Coral paid BMS a 30% consultant gross profit. Boland then accepted a position with a Coral competitor at the end of November 2009. Boland admitted he solicited several customers away from Coral after leaving the company.

¶ 37 2. *Peter Dority's Testimony*

¶ 38 Peter Dority, Coral's vice president of sales and marketing, testified regarding the provisions of the Agreement and the alleged acts of misconduct by BMS. Dority explained the Agreement set BMS's commission at a 40% consultant gross profit. Upon termination for

misconduct, Dority stated, BMS would receive no further commission. Likewise, BMS would receive no future commission upon termination if BMS accepted employment from a Coral competitor. If the Agreement was terminated for convenience by either party, for one year BMS would receive 30% of the commission previously earned while under contract with Coral. In other words, Dority explained, BMS would earn 30% of the 40% consultant gross profit. The commission would apply only to the accounts BMS was "solely responsible for developing," which would exclude accounts cultivated by other salespersons or the accounts previously held by Coral.

¶ 39 Dority stated he approved BMS's termination on October 1, 2009, due to alleged misconduct by BMS. LaFlamme, who reported to Dority, composed the letter sent to BMS with the approval of both Dority and John Schueneman. Dority explained he made the ultimate decision to terminate the Agreement.

¶ 40 The grounds for termination were based on BMS's misconduct with regard to two accounts: EK Machine and Lozier Oil. Dority acknowledged he never asked Boland to explain the circumstances surrounding the two incidents. With regard to EK Machine, Dority believed BMS committed misconduct by (1) attempting to usurp Roeser's role as Coral's salesperson for EK Machine; (2) withholding the names of the Caterpillar representatives visiting EK Machine in order to secure himself a commission for any sales; (3) misrepresenting the purpose of arranging for Caterpillar to view EK Machine in order to secure BMS accounts with Caterpillar and EK Machine, not to further Coral's interests; and (4) arriving late to the demonstration at EK Machine. Dority testified he found the misconduct with EK Machine to be so egregious he sent an apology letter to the company. This was the first time Dority had sent such a letter to a client

in his 25-year tenure with Coral.

¶ 41 On cross-examination, Dority conceded Boland did not know anyone at EK Machine prior to arranging the visit with Caterpillar. He also conceded Boland probably would not know how EK Machine's sales structure worked. Additionally, Dority acknowledged Boland did not know EK Machine made special arrangements to hold its production line until the Caterpillar representatives arrived to view the demonstration; therefore, Boland would have been unaware his tardiness to the demonstration delayed production even further.

¶ 42 With regard to Lozier Oil, Dority interpreted BMS's overture to share commission with Lozier Oil in exchange for marketing Coral products to be a kickback or bribe, which constituted misconduct. Dority explained Lozier Oil did not work on commission, so it was improper for BMS to offer commission in exchange for marketing Coral products.

¶ 43 In October 2009, Dority verified Coral paid BMS a 30% of the consultant gross profit, despite the termination for misconduct. He explained when Coral sent the termination letter to BMS, the letter included an offer to pay Boland a 30% consultant gross profit if Boland would agree not to compete with Coral. Dority noted Coral was not required to extend this offer because Coral terminated the Agreement for misconduct, but he stated Coral wanted to provide an incentive for Boland not to compete.

¶ 44 On October 28, 2009, Dority received a letter from BMS's attorney indicating BMS would become inactive and not engage in further sales, which is why BMS received commission for October 2009. However, Coral made no further payment because Boland accepted employment from a competitor in November 2009. Dority added Boland had been actively soliciting and taking Coral accounts ever since.

¶ 45 Dority provided a list of accounts "solely developed" by BMS, which included the consultant gross profit for each account from October 1, 2009, through October 1, 2010. Even if the Agreement was terminated for convenience, BMS would only receive commission on accounts BMS was "solely responsible for developing." The parties agreed Coral satisfied commission owed to BMS in October 2009. Two disputed accounts were not included on the list of accounts: Toyota and Caterpillar-Aurora.

¶ 46 Dority testified Toyota was not listed as one of BMS's accounts, but he noted the consultant's gross profit to be $15,776. Dority explained, not only did the Toyota account predate the Agreement with BMS, but BMS released its obligation to Toyota to another salesperson due to geographical concerns. With regard to Caterpillar-Aurora, the $34,000 consultant gross profit was also not included as one of BMS's accounts because that account was not fully developed until five or six months after BMS's termination. Sales between Coral and Caterpillar-Aurora began approximately 5 to 6 months after BMS's termination, but those sales were not from areas cultivated by BMS.

¶ 47 3. *John Schueneman's Testimony*

¶ 48 John Schueneman testified he was the owner and chief executive officer (CEO) of Coral. He explained the business model for Coral and described consultant gross profit as "gross sales, minus the consultant cost." He acknowledged the consultant costs would vary depending on the product but stated the consultant costs were settled in advance.

¶ 49 Schueneman testified he had personal knowledge of BMS establishing a Caterpillar account for Coral, though he noted Coral had two minor accounts with Caterpillar prior to BMS involvement. The only complaints of misconduct he received regarding BMS's

performance were regarding the visit to EK Machine and the Lozier Oil proposal. Schueneman examined the e-mail communication between LaFlamme and Boland in which Boland suggested paying commission to Lozier Oil for helping to market Coral products to Caterpillar. After reading the e-mail, Schueneman testified he found no misconduct contained within that communication. Further, with regard to the alleged misconduct at EK Machine, Schueneman did not believe BMS committed misconduct by (1) arranging a demonstration for Caterpillar at EK Machine; (2) going to the EK Machine facility in advance of the demonstration to ensure the facility was ready; (3) asking EK Machine, an existing Coral customer, to open its facility for Caterpillar, a potential customer; or (4) offering BMS's services to EK Machine that do not compete with Coral. However, Schueneman conceded any determination of misconduct would be under Dority's purview.

¶ 50 When asked whether Coral had a zero-tolerance policy for misconduct, Schueneman explained Coral takes "the best action for the shareholders and the business." He believed Coral may have suffered short-term, but BMS's termination was in the long-term best interests of the company.

¶ 51 4. *Matt Roeser's Testimony*

¶ 52 Matt Roeser testified he was a Coral employee in the sales department during the late summer and fall of 2009. One of his accounts was with EK Machine, a company which had been a Coral customer for less than a year. Roeser was able to procure EK Machine as a client for Coral because he had a relationship with EK Machine prior to working for Coral. Roeser explained his role at Coral went beyond selling products and included training personnel on using the chemicals and understanding paperwork. The first step in procuring a client for Coral

is to verify no other sales associate was developing that particular account. Roeser acknowledged his role differed from Boland's because Roeser was a Coral employee, while Boland was an independent sales consultant.

¶ 53 On Monday, August 31, 2009, BMS contacted Roeser about scheduling a Caterpillar visit at EK Machine. At that time, it was well known that Roeser was responsible for EK Machine's account with Coral. Roeser described EK Machine as having a unique operating system in an "extremely clean" environment that would have fit Caterpillar's needs for the removal of laser oxide. Although other companies with Coral accounts had laser oxide removal processes, Roeser thought EK Machine had one of the best production lines. Roeser realized a visit from Caterpillar was an opportunity, not only for Coral, but for EK Machine to expand its market.

¶ 54 At the time, Roeser stated he was not aware BMS had pioneered Coral's entry into the Caterpillar market. Although Roeser first contacted EK Machine to obtain consent and arrange a demonstration date, Boland personally scheduled Caterpillar's visit for Thursday, September 3, 2009, at 9:30 a.m. While scheduling the visit, EK Machine asked Roeser to verify Caterpillar representatives, not competitors, were viewing the process. Boland did not provide the names, despite Roeser requesting them on multiple occasions.

¶ 55 While planning the demonstration, a representative from EK Machine told Roeser he wanted to provide lunch for the Caterpillar representatives after the viewing. Roeser stated he talked to Boland about the Caterpillar representatives remaining for lunch after the viewing to network.

¶ 56 Roeser testified Boland requested to view the EK Machine facility in advance of

the demonstration, and his visit was scheduled for Wednesday, September 2, 2009. After Boland visited EK Machine, Roeser discovered Boland met with the head of sales from EK Machine. Roeser said the meeting would be uncommon because EK Machine already had a relationship with Roeser. Boland did not tell Roeser he intended to meet with the EK Machine sales manager.

¶ 57 On Thursday, the date of the demonstration, Boland and the Caterpillar representatives arrived late. When Boland did not arrive at 9:30 a.m. as scheduled, Roeser called him. Boland informed Roeser he was on his way but running late. Roeser indicated the time of the viewing was important because EK Machine coordinated its production schedule to accommodate Caterpillar's viewing. Roeser recalled Boland arrived simultaneously with one of the Caterpillar representatives. That representative did not have a business card or any identification, so Roeser was forced to "vouch" for him. Roeser could not recall when the second Caterpillar representative arrived. The Caterpillar representatives viewed the process for approximately 45 minutes, which Roeser believed to be sufficient time to view the process. During the demonstration, Boland asked for data from EK Machine's system to share with Caterpillar, which Roeser thought to be inappropriate. Roeser believed information could have been legitimately requested from Coral without burdening EK Machine. According to Roeser, EK Machine was "extremely irritated and angry" by Boland's request for data.

¶ 58 Afterward, the Caterpillar representatives declined EK Machine's lunch invitation. Roeser stayed afterward to "smooth things over" because he believed EK Machine did not get everything out of the day it wanted. Roeser testified representatives from EK Machine were disappointed, not only because the Caterpillar representatives declined lunch, but also because

the Caterpillar representatives arrived too late to network over morning donuts.

¶ 59 Roeser testified Coral did not lose any business from EK Machine based on Boland's visit, but he stated he had to salvage Coral's reputation with EK Machine.

¶ 60 5. *Dan Weinberger's Testimony*

¶ 61 Dan Weingberger testified he was a sales manager for EK Machine in 2009 when Caterpillar representatives came to view EK Machine's process. On Wednesday, September 2, 2009, when Boland came to preview the line, the paint line manager asked Weinberger to meet with Boland. Boland asked Weinberger about forging a relationship between EK Machine and Caterpillar, with BMS receiving commission on any sales. Weinberger testified he did not have the authority to hire BMS; another division handled sales contracts. In fact, Weinberger explained, EK Machine had recently hired a sales representative to develop a relationship with Caterpillar. Weinberger testified Boland continued his attempt to solicit business, discussing a possible "finder's fee." Weinberger said he was surprised by Boland's request because Boland worked for Coral. During that meeting, Weinberger twice requested the names of the Caterpillar representatives who were coming to view the line.

¶ 62 On Thursday, September 3, 2009, EK Machine stopped running the production line in preparation for the visit from Caterpillar representatives. When no one appeared for the 9:30 a.m. meeting, Weinberger instructed Roeser to call Boland, who said he was running late. At that time, Weinberger expressed to Roeser his displeasure at Boland's proposition the day before.

¶ 63 When Boland arrived with one Caterpillar representative, that representative did not present any identification. Weinberger stated he was worried about a potential security

breach until the second representative arrived with identification. During the demonstration, Boland requested to extract data from EK Machine systems for Caterpillar. EK Machine denied that request. After the visit, EK Machine was unable to secure a relationship with Caterpillar, despite two attempts to contact the representatives who viewed the line. Weinberger conceded Boland probably did not know the limited line EK Machine was running that day, specifically for the viewing. Weinberger further testified he received a written letter of apology from Dority regarding Boland and BMS's conduct with regard to the visit from Caterpillar representatives.

¶ 64 C. Posttrial Proceedings

¶ 65 The parties submitted written closing statements to the trial court. In its closing, BMS requested 30% commission for the 11 months from November 1, 2009, through September 30, 2010, plus 5% prejudgment interest. The court filed a written order on May 4, 2012, with the following findings. First, the court found Coral did not have the right to terminate Boland's contract for misconduct. The court relied on Black's Law Dictionary in finding that the evidence did not show "a dereliction from duty" or "unlawful behavior." This definition was supplied to the court by Coral in a memorandum of law filed December 12, 2011.

¶ 66 Second, the court determined the terms of the Agreement did not apply to Boland individually, but to BMS. Therefore, Boland's individual employment with a competitor was not sufficient to terminate his commission under section 6D of the Agreement. The court found Boland did not accept Coral's October 2009 offer to pay him a 30% consultant gross profit for the next year in exchange for him refraining from accepting employment with a competitor.

¶ 67 Because the trial court determined Coral could not terminate the contract for misconduct, the court construed the termination as one of convenience. The court interpreted the

amount owed to be 30% of the amount BMS otherwise would have earned as a consultant, which was 40% commission. The court relied upon Coral's exhibit No.13, which listed accounts "solely developed by" BMS. Moreover, the court found the disputed accounts, Caterpillar-Aurora and Toyota, were rightfully excluded from the list. The court awarded BMS 30% of the 40% consultant gross profit for November 2009 through September 2010.

¶ 68 Finally, the trial court determined prejudgment interest was not appropriate because there was not "a fixed or easily calculated amount due from a debtor-creditor relationship that [came] into existence by virtue of a written instrument, and that there was no unreasonable or fictitious delay on the part of the defendant to merit awarding prejudgment interest as defendant raised an honest dispute as to what amount if any was due and owing."

¶ 69 In May 2012, BMS filed a motion to modify the trial court's judgment, requesting the court increase the amount owed to BMS to represent 30% of the consultant gross profit and to award prejudgment interest. In June 2012, BMS also filed a motion pursuant to Illinois Supreme Court Rule 137, contending Coral lacked good faith in asserting the defense of misconduct.

¶ 70 Later that month, Coral moved to strike Boland's Rule 137 motion. Coral also filed its own motion for sanctions pursuant to Rule 137, alleging BMS's posttrial motions "1) [are] not grounded in fact, 2) are not warranted by existing law or a good faith argument, and 3) are frivolous and imposed for the improper purpose of harassing [Coral] and delaying the proceedings." Coral requested attorney fees to compensate the costs of filing both the motion to modify judgment and the Rule 137 motion. On June 14, 2012, the trial court denied Boland's motion to modify judgment and both parties' Rule 137 motions. This appeal followed.

¶ 71 II. ANALYSIS

¶ 72 On appeal, BMS asserts the trial court erred by (1) miscalculating commission owed to BMS under the contract, (2) denying BMS's Rule 137 motion for sanctions, and (3) failing to order prejudgment interest on commission owed to BMS. Coral cross-appeals, alleging the trial court erred by (1) finding BMS committed no misconduct under the contract and (2) awarding BMS commission pursuant to the contract despite BMS's termination for misconduct. We address the parties' arguments in turn, beginning with Coral's cross-appeal.

¶ 73 A. Whether the Trial Court Erred in Finding a "Termination for Convenience"

¶ 74 On cross-appeal, Coral argues the trial court erred in finding Coral terminated the Agreement for convenience rather than misconduct. The court's interpretation of the contractual term "misconduct" is subject to *de novo* review as a question of law. See *Asset Recovery Contracting, LLC v. Walsh Construction Company of Illinois*, 2012 IL App (1st) 101226, ¶ 57, 980 N.E.2d 708 (2012). The court's application of the facts to the Agreement, as ascertained at trial, will be overturned only if it is against the manifest weight of the evidence. See *Eychaner v. Gross*, 202 Ill. 2d 228, 251, 779 N.E.2d 1115, 1130 (2002).

¶ 75 1. *Trial Court's Interpretation of "Misconduct"*

¶ 76 In determining whether a contractual term is ambiguous, the reviewing court must first look to the four corners of the contract for interpretation. *Air Safety, Inc. v. Teachers Realty Corp.*, 185 Ill. 2d 457, 462, 706 N.E.2d 882, 884 (1999); see also *Gassner v. Raynor Manufacturing Co.,* 409 Ill. App. 3d 995, 1007, 948 N.E.2d 315, 326 (2011). A term is considered ambiguous if it is susceptible to more than one meaning. *Air Safety*, 185 Ill. 2d at 462, 706 N.E.2d at 884. Only if a term is determined to be facially ambiguous should the court

consider parol evidence in interpreting the term. *Air Safety, Inc. v. Teachers Realty Corp.*, 185 Ill. 2d at 462, 706 N.E.2d at 884. Any ambiguity should be construed against the drafter. *Dowd & Dowd, Ltd. v. Gleason,* 181 Ill. 2d 460, 479, 693 N.E.2d 358, 368 (1998).

¶ 77 In this case, paragraph 5B of the Agreement states,

> "Coral shall have the right to terminate this Agreement immediately without notice in the event [BMS] or [Boland] is convicted of a fraud or a crime of moral turpitude, becomes bankrupt, has insolvency proceedings instituted against it or him, or engages in an act of dishonesty or other misconduct."

¶ 78 No provision contained within the four corners of the Agreement further defines "other misconduct," nor does it refer to an external document, such as an employee manual, for further guidance. We find the term "misconduct," on its face, susceptible to multiple interpretations. We therefore conclude the term is ambiguous, and it was appropriate for the court to consider parol evidence to further define the term.

¶ 79 The trial court resolved the ambiguity by turning to Black's Law Dictionary for the definition of "misconduct," a definition recommended by Coral. Black's Law Dictionary defines "misconduct" as "a dereliction of duty; unlawful or improper behavior." Black's Law Dictionary 1019 (8th ed. 1999). Although the court applied the definition of "misconduct" as Coral requested, Coral now asserts for the first time on appeal that the court should have considered other definitions of misconduct. Under the doctrine of invited error, a party may not request to proceed in one manner and later argue on appeal the course of action was in error. *People v. Carter,* 208 Ill. 2d 309, 319, 802 N.E.2d 1185, 1190 (2003).

¶ 80 Moreover, the trial court's reliance on Black's Law Dictionary to define "misconduct" as "a dereliction of duty; unlawful or improper behavior" was appropriate, given the ambiguous nature of the term "misconduct." Neither party objected to the court's use of Black's Law Dictionary to define the term; in fact, the court adopted the suggestion provided by Coral. We conclude the court did not err in its interpretation of the ambiguous term "misconduct."

¶ 81 2. *Trial Court's Application of Facts Regarding BMS's Alleged Misconduct*

¶ 82 Coral claims the trial court erred in finding BMS did not commit misconduct. On review, the trial court's findings with regard to the credibility of witnesses and other evidence will not be overturned unless those findings are against the manifest weight of the evidence. *Eychaner*, 202 Ill. 2d at 251, 779 N.E.2d at 1130.

¶ 83 At trial, several witnesses produced contradictory evidence regarding whether BMS committed dishonesty or misconduct. Notably, Coral's CEO, Schueneman, did not find any misconduct with regard to BMS (1) proposing a commission to Lozier Oil in exchange for marketing Coral products to Caterpillar, (2) visiting EK Machine prior to the Caterpillar visit to make sure the product line was in order, (3) requesting an existing Coral customer showcase Coral products for a potential customer, or (4) discussing the sale of EK Machine products to Caterpillar. However, Schueneman also stated he deferred to Dority to make decisions regarding employee misconduct.

¶ 84 Conversely, Dority testified he believed BMS did commit misconduct, outlining several instances he interpreted as misconduct, including BMS (1) attempting to usurp Roeser's sales position at Coral, (2) misrepresenting the purpose of Caterpillar's visit to EK Machine in an

attempt to secure a sales agreement between EK Machine and Caterpillar, (3) arriving late to the EK Machine demonstration for Caterpillar, (4) withholding the names of Caterpillar representatives from EK Machine, and (5) proposing a kickback or bribe to Lozier Oil for marketing Coral products.

¶ 85 Boland, however, directly contradicted Dority's testimony with respect to all five of the aforementioned allegations of misconduct. With regard to EK Machine, Boland explained he was attempting to increase Coral sales by asking Caterpillar to view a product demonstration. Second, after viewing the line, Boland recognized an opportunity to forge a relationship between EK Machine and Caterpillar, which would not have impacted Roeser's EK Machine account with Coral. Third, Boland conceded he was late to the demonstration, but he argued EK Machine could not start the demonstration until the final Caterpillar representative arrived, long after Boland. Fourth, though Boland did not call EK Machine to inform it of his tardiness, Roeser called Boland, at which time Boland explained he and one of the Caterpillar representatives were running behind schedule. In addition, Boland provided uncontradicted testimony that he did not know his and the Caterpillar representatives' late arrival delayed production on EK Machine's line.

¶ 86 With regard to the offer to Lozier Oil, Boland testified he was not offering a bribe or kickback; Caterpillar and Coral were both apprised of this proposal before he openly disclosed it in an e-mail. Boland noted he would have lost commission under the proposal with Lozier Oil because he would have split the commission with Lozier Oil, which would be inconsistent with a kickback or bribe.

¶ 87 Weinberger of EK Machine believed BMS acted wrongly in proposing a sales

agreement with EK Machine. Weinberger acknowledged he was unaware BMS could rightfully solicit business under the Agreement. Additionally, Weinberger believed BMS acted improperly in refusing to disclose the names of the visiting Caterpillar representatives upon request for a security check. Again, Boland provided contradictory testimony, explaining he only spoke with Weinberger after viewing an excellent production line in order to help EK Machine and Caterpillar forge a business relationship. Boland further stated he did not refuse to disclose the names of the Caterpillar representatives; BMS did not have an opportunity to clear the request with Caterpillar in the short interim between the scheduling of the viewing and the demonstration. Regardless, Boland stated, the Caterpillar representatives provided sufficient identification to placate EK Machine on the date of the viewing.

¶ 88 Roeser also believed BMS committed misconduct by asking EK Machine to provide proprietary information to the Caterpillar representatives, by arriving late to the demonstration, and by approaching Weinberger about securing a deal between EK Machine and Caterpillar. Roeser explained he had to restore the resulting damage to EK Machine's relationship with Coral due to BMS's misconduct.

¶ 89 As the trier of fact, the trial court was in the best position to determine the credibility of the witnesses and the evidence. The court determined the facts ascertained at trial did not constitute misconduct, *i.e.*, "a dereliction of duty; unlawful or improper behavior." Based on the contradictory testimony throughout the trial, we conclude the court's finding was not against the manifest weight of the evidence.

¶ 90 B. Whether the Trial Court Erred in its Calculation of Commission

¶ 91 BMS argues the trial court erred in its calculation of commission for BMS.

Construction of an unambiguous contract is question of law subject to *de novo* review. *Guerrant v. Roth,* 334 Ill. App. 3d 259, 263, 777 N.E.2d 499, 502 (2002). In determining the intentions of the parties, we look to the plain meaning of the terms of the contract to determine if any ambiguity exists.

¶ 92 Because we have concluded the trial court's finding that BMS's termination was a "termination of convenience" was not against the manifest weight of the evidence, we look to section 6B of the Agreement, which governs commission following a termination of convenience.

> "In the event of a Termination for Convenience, Coral shall pay Boland for one (1) year thereafter thirty percent (30%) of the consultant gross profit that would have otherwise been earned by Boland for continuing purchases by customers he was solely responsible for developing."

¶ 93 The parties in this case agree the terms contained within the Marketing Agreement are unambiguous but offer differing interpretations of the terms. "Although a contract is not 'ambiguous' merely because the parties disagree as to its meaning, a contract will be deemed ambiguous if its language is susceptible to more than one reasonable interpretation." *Guerrant*, 334 Ill. App. 3d at 264, 777 N.E.2d at 503.

¶ 94 In this case, the parties dispute the terms governing the calculation of commission owed to BMS upon a termination for convenience. The parties agree BMS was entitled to 30% commission upon termination for convenience. However, the question is whether BMS is entitled to 30% of the consultant gross profit or whether BMS is entitled to 30% of the 40%

consultant gross profit. The trial court awarded BMS 30% of the 40% consultant gross profit. We agree with the trial court and hold the contract, based on its plain meaning, was not ambiguous.

¶ 95 BMS asserts Coral's interpretation of the Agreement would leave BMS with only 12% of the consultant gross profit, a figure not mentioned within the Agreement. Moreover, the term "40%" is not mentioned anywhere within section 6 of the Agreement; therefore, BMS argues it was inappropriate for the trial court to read that figure into the language of section 6B.

¶ 96 The plain, unambiguous language of the Agreement states BMS would receive 30% of the consultant gross profit *"that would have otherwise been earned"* by BMS (emphasis added). Section 3A fixed BMS's commission at 40% of the gross profit for all sales generated by BMS, a figure undisputed by the parties. Therefore, the consultant gross profit "that would have otherwise been earned by [BMS]" was 40%. When substituting the 40% figure, we determine BMS was to receive 30% of the 40% consultant gross profit, which is consistent with the trial court's calculation.

¶ 97 BMS points to an e-mail sent by Dority to Coral's comptroller, Ellen Gross, on October 28, 2009, in which Dority stated Boland is to receive 30% of the consultant gross profit, or 75% of his previous earnings for a period of one year. BMS argues the e-mail is evidence that the Agreement should be interpreted to allow BMS a commission at 30% of the consultant gross profit. However, we find it important to note this e-mail followed the termination letter sent to Boland in which Coral offered Boland 30% of the consultant gross profit if he agreed not to compete with Coral, despite Coral's allegations of misconduct by BMS. This e-mail constituted a posttermination offer wholly separate from the Agreement; therefore, we disagree the e-mail

explains or advances any interpretation of the Agreement.

¶ 98 Based on the plain, unambiguous language of the Agreement, we conclude the trial court did not err in awarding BMS 30% of the 40% consultant gross profit.

¶ 99 C. Whether the Trial Court Erred in Denying BMS Prejudgment Interest

¶ 100 BMS argues it is entitled to prejudgment interest because the amount owed was fixed and easily calculated. BMS does not raise any other challenges to the trial court's decision regarding prejudgment interest. We note the contract did not include a liquidated damages clause or any other provision regarding prejudgment interest; thus, BMS's claim arises solely from the Interest Act (815 ILCS 205/2 (West 2010)). A reviewing court "will not disturb the trial court's findings of fact pertinent to prejudgment interest unless those findings are contrary to the manifest weight of the evidence." *Milligan v. Gorman*, 348 Ill. App. 3d 411, 416, 810 N.E.2d 537, 541 (2004).

¶ 101 The Interest Act states as follows:

> "Creditors shall be allowed to receive at the rate of five (5) per centum per annum for all moneys after they become due on any bond, bill, promissory note, or other instrument of writing; on money lent or advanced for the use of another; on money due on the settlement of account from the day of liquidating accounts between the parties and ascertaining the balance; on money received to the use of another and retained without the owner's knowledge; and on money withheld by an unreasonable and vexatious delay of payment." 815 ILCS 205/2 (West 2010).

¶ 102 In its written order, the trial court found there was "not a fixed or easily calculated amount due from a debtor creditor relationship that has come into existence by virtue of a written instrument, and that there was no unreasonable or fictitious delay on the part of [Coral] to merit awarding prejudgment interest as [Coral] has raised an honest dispute as to what amount if any was due and owing."

¶ 103 Interest may be awarded "although a good faith defense exists and even where the claimed right and the amount due require legal ascertainment." *La Grange Metal Products v. Pettibone Mulliken Corp.,* 106 Ill. App. 3d 1046, 1054, 436 N.E.2d 645, 652 (1982). See also *Kansas Quality Construction, Inc. v. Chiasson*, 112 Ill. App. 2d 277, 250 N.E.2d 785 (1969). To be entitled to prejudgment interest based on a contract dispute, BMS must show a fixed or easily ascertainable amount due on an instrument of writing. See *Milligan,* 348 Ill. App. 3d at 416, 810 N.E.2d at 541.

¶ 104 First, we conclude the amount due to BMS was easily ascertainable, despite the parties disputing the total amount due. This is not a situation in which BMS is seeking remuneration for a loss of goodwill or other intangible damages. Coral presented a listing of all BMS accounts with the consultant gross profit clearly stated for each account from October 2009 through October 2010. Although the parties engaged in a good-faith disagreement over the amount due, once the court made its findings, the amount due was easily calculable. Throughout the proceedings, the parties never disputed the consultant gross profit for each account; the dispute centered solely on how much of that consultant gross profit BMS was entitled to, if any.

¶ 105 Second, we conclude the Agreement between Coral and BMS constituted an "instrument of writing" as required under the Interest Act (815 ILCS 205/2 (West

2010)). To qualify as an "instrument of writing," a document must (1) establish a debtor-creditor relationship and (2) contain a specific due date for payment. *Adams v. American International Group, Inc.*, 339 Ill. App. 3d 669, 674, 791 N.E.2d 26, 30 (2003). The termination provision of the Agreement set forth financial obligations owed by Coral to BMS, which is sufficient to create a debtor-creditor relationship as contemplated by the statute, despite the fact that the purpose of the Agreement was to establish a sales and employment agreement.

¶ 106 The Agreement does not state a specific date on which payment is due. However, the inquiry does not end there. "[I]n the absence of a specific due date in the instrument itself, interest may nevertheless be allowed in cases in which the subject matter of the underlying obligation carried with it an inherent due date. *Reserve Insurance Company v. General Insurance Company of America*, 77 Ill. App. 3d 272, 283, 395 N.E.2d 933, 940 (1979). Here, the Agreement states, "in the event of a Termination for Convenience, Coral shall pay [BMS] for one (1) year thereafter thirty percent (30%) of the consultant gross profit that would have otherwise been earned by [BMS]." The previously mentioned language identifies an event from or with reference to which payments is due, constituting an inherent due date. See *Reserve Insurance*, 77 Ill. App. 3d at 282-83, 395 N.E.2d at 559-60. In other words, according to the Agreement, once a termination for convenience occurs, payments should be made for one year following the termination for convenience date. The undisputed termination date was October 1, 2009. We conclude the specific due dates for payments from Coral to BMS encompassed regular payment dates from October 1, 2009 through October 1, 2010. Those regular payment dates should be consistent with the schedule in which BMS received payments from Coral while under contract. Interest is calculated from the point in which payment comes due. *Haas v. Cravatta*,

71 Ill. App. 3d 325, 332, 389 N.E.2d 226, 231 (1979). Therefore, we conclude BMS is entitled to prejudgment interest from October 1, 2009, through May 4, 2012, the date on which the trial court entered judgment.

¶ 107 Because we find an ascertainable amount due on an instrument of writing, we hold the trial court's denial of prejudgment interest to be against the manifest weight of the evidence. We reverse and remand this issue to the trial court for calculation of prejudgment interest from October 1, 2009, through May 4, 2012.

¶ 108 D. Whether the Trial Court Erred in Denying BMS's Motion for Sanctions Pursuant to Illinois Supreme Court Rule 137

¶ 109 BMS asserts the trial court erred in denying BMS's motion for sanctions pursuant to Illinois Supreme Court Rule 137. The court's finding is given great deference and will be overturned only if it was an abuse of discretion. *Pritzker v. Drake Tower Apartments, Inc.,* 283 Ill. App. 3d 587, 590, 670 N.E.2d 328, 330 (1996).

¶ 110 Rule 137 states as follows:

> "The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation."

Ill. S. Ct. R. 137 (eff. Feb. 1, 1994).

¶ 111 The purpose of Rule 137 is to restrict and penalize frivolous or false claims, not merely to punish an unsuccessful claim. *Morris v. Harvey Cycle & Camper, Inc.*, 392 Ill. App. 3d 399, 407, 911 N.E.2d 1049, 1057 (2009); see also *Peterson v. Randhava*, 313 Ill. App. 3d 1, 7, 729 N.E.2d 75, 80 (2000). "Courts should construe Rule 137 narrowly and apply it only in cases falling strictly within its terms." *Miner v. Fashion Enterprises, Inc.*, 342 Ill. App. 3d 405, 422, 794 N.E.2d 902, 918 (2003).

¶ 112 In asserting this claim, BMS argues "there was not even a scintilla of misconduct" presented at trial. We disagree. Several witnesses testified to perceived misconduct on the part of BMS, including Dority, Roeser, and Weinberger. BMS relies on Schueneman's testimony to prove "not even a scintilla of misconduct" occurred. However, as explained in detail above, other witnesses contradicted Schueneman's testimony, which required the trial court to make factual findings with regard to the evidence.

¶ 113 We find it noteworthy BMS did not file a motion for sanctions pursuant to Rule 137 until after the trial court made its decision in favor of BMS, despite knowing about this affirmative defense two years before the trial. We also note BMS did not file a motion for sanctions pursuant to Rule 137 during the five-month interim between the trial and the filing of the court's written order. To hold in favor of BMS would be to punish an unsuccessful claim, not to penalize a frivolous or false claim. See *Morris*, 392 Ill. App. 3d at 407, 911 N.E.2d at 1057.

¶ 114 In this case, the trial court's findings did not specify Coral presented a defense (1) not well grounded in fact; (2) unwarranted by existing law; (3) constituting a bad-faith argument for the extension, modification, or reversal of existing law; or (4) interposed for any improper

purpose. Rather, after weighing the evidence, the court inevitably found BMS's arguments more persuasive. In fact, the court stated Coral "has raised an honest dispute as to what amount if any was due and owing," which infers the court had grounds upon which to find misconduct by BMS. Additionally, the court noted BMS's conduct was not ideal. An "honest dispute" does not rise to the level required to impose sanctions pursuant to Rule 137. We therefore conclude the trial court did not abuse its discretion in denying BMS's motion for sanctions.

¶ 115 III. CONCLUSION

¶ 116 For the foregoing reasons, we affirm the trial court's findings regarding (1) the definition of misconduct, (2) the application of facts regarding misconduct, (3) the calculation of commission owed to BMS, and (4) the denial of BMS's motion for sanctions pursuant to Rule 137. However, we reverse the trial court's denial of prejudgment interest from October 1, 2009, through the date of judgment, May 4, 2012.

¶ 117 Affirmed in part and reversed in part; cause remanded with directions.